Supreme Court, U.S.
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NO. 99-1241

IN THE
# SUPREME COURT OF THE UNITED STATES

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,
*Petitioners,*

*v.*

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. GAULT and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents, MARY and KEVIN PECK, and MARY PECK and KEVIN PECK, individually,
*Respondents.*

*On Petition for a Writ of Certiorari to the Court of Common Pleas of the First Judicial District of Pennsylvania*

## RESPONDENTS' BRIEF IN OPPOSITION

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## COUNTER-STATEMENT OF JURISDICTION

### A. There is No Basis for Jurisdiction; Quite Obviously (and as Confirmed by the State Appellate Courts' Quashals of Defendants' Premature Appeals), the Trial Court's Orders Permitting the Underlying Cases to Proceed Were Not Final Orders

Petitioners (referred to herein as "defendants") purport to invoke this Court's jurisdiction based on the premise that the trial court's interlocutory orders of August 20, 1998, opening judgments and allowing the underlying cases to proceed towards trial, somehow constituted a "final judgment", reviewable under 28 U.S.C. § 1257. *See*, Petition for a Writ of Certiorari ("Defendants' Petition") at 2. Yet, that premise is unquestionably false. This matter is no more ripe for certiorari than it was for appeal in Pennsylvania. Indeed, defendants filed premature appeals to the Pennsylvania appellate courts, which were quashed. Now, rather than wait, as the law requires, until review in the State court system will be proper, defendants seek to bypass that system entirely. In doing so, they display a disregard for the Rules of this Court just as complete as the disregard they have shown for the Rules in Pennsylvania.

The statute, 28 U.S.C. § 1257, "establishes a firm final judgment rule." *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 118 S.Ct. 481, 485, 139 L.Ed.2d 433 (1997). Specifically,

> To be reviewable by this Court, a state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court."

*Id.*, 118 S.Ct. at 485-486, *quoting, Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551, 65 S.Ct. 770, 773, 89 L.Ed. 1171 (1945). The orders here plainly are not final, in either sense.

As detailed in the Counter-Statement of the Case below, the trial court, in granting plaintiffs' Petition for Extraordinary Relief in the Nature of an Omnibus Petition to Open Judgments and Provide Further Relief ("Omnibus Petition"), opened judgments in the underlying cases and put those cases back on track, "to prevail — or fail — on their merits either at trial or prior to trial." *See*, 96a-97a. In doing so, the court also denied

defendants' Motion for a Scheduling Order to conduct certain discovery — and it is that ruling which is the basis for defendants' due process claim, and their Petition to this Court. Defendants' due process claim is frivolous on its face. Indeed, the trial court denied defendants' Motion because it properly concluded, *inter alia*, that the extensive discovery requested by defendants **was not even material** to the central issues presented in the Omnibus Petition. *See*, 92a. For instant purposes, however, the important point is that, even though defendants' due process claim is patently frivolous, review of that claim has **not** been foreclosed in the Pennsylvania courts. To the contrary, defendants were simply, and properly, not permitted to have that claim reviewed **prematurely**.

That is, defendants attempted to appeal the trial court's interlocutory orders of August 20, 1998 as of right, contending that they were final orders, and/or that they were interlocutory orders directly appealable under the Pennsylvania collateral order doctrine. Both contentions were plainly meritless, as it is well-settled under Pennsylvania law that orders opening

judgments are neither final orders, nor interlocutory orders appealable as of right. *See, Puricelli v. Puricelli*, 446 Pa. Super. 493, 667 A.2d 410, 412-414 (1995). Indeed,

> An order opening judgment, as in the instant case, does not end the litigation, nor preclude participation by certain parties in the litigation, nor result in the irreparable loss of the claim. On the contrary, **this order opens up the possibility of further litigation between the parties, while causing neither irreparable loss nor prejudice to Appellant. Review of the correctness of the trial court's action in opening the judgment is merely postponed to a later date.**

*Joseph Palermo Dev. v. Bowers*, 388 Pa. Super. 49, 564 A.2d 996, 998 (1989). (Emphases added). *Compare, Jefferson, supra*, 118 S.Ct. at 486 ("[t]he Alabama Supreme Court's decision [deciding federal question and remanding for resolution of state law claims] was not a 'final judgment.' It was avowedly interlocutory. ... Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims.").[1]

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[1] As further discussed below, the conclusion reached by this Court in *Jefferson*, that the requirements of 28 U.S.C. § 1257 were not satisfied, is even more obvious here. That is because the Alabama

Accordingly, the Pennsylvania Superior Court quashed defendants' premature appeals, as the law required. *See*, 107a-110a. The Pennsylvania Supreme Court then denied defendants' Petition for Allowance of Appeal from that decision. *See*, 115a-118a. (The appellate courts also denied defendants' attempt to seek discretionary review of the trial court's interlocutory orders. *See*, 104a-106a; 111a-114a).

These decisions must be echoed here. As the trial court observed:

> The practical effect of the August 20, 1998 orders granting Plaintiffs' Omnibus Petition, it should be remembered, is not to deny any party discovery on the merits of the claims asserted by plaintiffs. Although defendants suggest that it was error to grant this Petition because discovery at this juncture will reveal that at least some of plaintiffs' cases were without merit, ... the best method for making this determination is to place these cases back on track where they will prevail — or fail — on their merits either at trial or prior to trial.

*See*, 96a-97a. (Footnote omitted).

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Supreme Court did, at least, hear and decide the merits of the federal claim in *Jefferson*, prior to remanding the matter for resolution of the state law claims. Here, instead, no Pennsylvania court has yet to even hear, much less to decide, any of defendants' claims on appeal.

Similarly, the effect of the rulings of the Pennsylvania appellate courts, quashing defendants' premature appeals of the interlocutory orders, and refusing to grant discretionary review, was not to deny defendants any appellate rights, including the "right" to raise frivolous due process claims, at the proper time.[2] That is, "if the [trial court's] decision on the federal claim ultimately makes a difference to the defendants" — in particular, if plaintiffs prevail at trial — then defendants may appeal, in Pennsylvania, and, of course, "they will be free to seek our review once the state-court litigation comes to an end." *Jefferson, supra*, 118 S.Ct. at 486.[3]

Thus, it is obvious that there was no "final judgment," as required under 28 U.S.C. § 1257. Defendants seek to evade this obvious fact by a grossly misplaced reliance on the

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[2] It is, thus, blatantly false for defendants to assert, instead, that "the constitutional question is not subject to further review in the State court proceedings" (*see*, Defendants' Petition at 2).

[3] If, conversely, defendants prevail and obtain judgments (this time on the merits), then, of course, the trial court's decision will not "make[ ] a difference" (*id.*), as defendants will then have the exact same result which they falsely claim, here, has been disturbed in violation of their due process rights.

exception set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). Specifically, there is "a limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in lower state courts." *O'Dell v. Espinoza*, 456 U.S. 430, 102 S.Ct. 1865, 1866, 72 L.Ed.2d 237 (1982). Yet, the threshold requirement common to this "limited set of situations" is that "the highest court of a State has finally determined the federal issue ..." *Cox Broadcasting Corp., supra*, 95 S.Ct. at 1037.

Here, no such determination was made by any appellate court of Pennsylvania, much less by "the highest court." The exception is, therefore, inapplicable on its face.[4]

A final jurisdictional flaw should be noted. Defendants seek a writ of certiorari to the trial court. However, the controlling statute gives this Court jurisdiction only over final judgments or decrees rendered by "the highest court of a

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[4] Of course, even when this threshold requirement is satisfied (as it unquestionably is not here), that does not mean that the exception will, in fact, apply. For example, in *Jefferson, supra*, 118 S.Ct. at 486-87, the requirement was, apparently, satisfied, yet this Court held that the exception was, nonetheless, inapplicable.

State in which a decision could be had ..." 28 U.S.C. § 1257.

Defendants cite *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292 (1935)[5] and *Virginia Ry. Co. v. Mullens*, 271 U.S. 220, 46 S.Ct. 526, 70 L.Ed. 915 (1926), for the proposition that a trial court can satisfy this essential criterion. Yet, there is no question that the trial court in this matter cannot do so. The rule of these cases does no more, in essence, than to repeat the language of the statute, inapplicable here. That is, these cases involved situations in which there was a final judgment by the trial court and that judgment was not reviewed and thus became unreviewable by any state appellate court, making it a final judgment of the highest state court in which a decision could be had.

That certainly is not the case here. As shown above, the orders here were not final, as a matter of law. Furthermore, all aspects of those orders — including those which defendants

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[5] Defendants neglect to note that *Grovey* was expressly overruled by this Court in *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944). It was overruled on the merits, not with respect to the jurisdictional issue. Nonetheless, proper citation to this fact should, obviously, have been made by the defendants.

falsely claim violated due process — may be reviewed once final judgment is rendered; as such, they are reviewable, as a matter of law. It is, then, axiomatic that the trial court is not the highest state court in which a decision could be had, and this essential requisite of 28 U.S.C. § 1257, too, cannot be met.

Accordingly, for all of the foregoing reasons, this Court clearly lacks jurisdiction over the matter at bar. Defendants' Petition must, therefore, be denied. Plaintiffs will, nonetheless, proceed to address the "merits" of that Petition, below.

## COUNTER-STATEMENT OF THE CASE

### A. In an Attempt to Fabricate an Issue Which This Court Can and Should Review, Where There is None, Defendants Have Utterly Misrepresented the Nature of the Proceedings, and the Trial Court's Interlocutory Decision, in this Matter

In making the equitable determination of whether to open its judgments, a trial court is not, of course, required to ignore dispositive facts incontestably established by the record before it. Nor, faced with those facts, is the court required to authorize a time-consuming and futile plan of discovery which will not and does not even purport to contradict them. Yet this

is precisely what the defendants contend the trial court was required to do, and which they assert provides reason for this Court to effectively overturn the decision of the Pennsylvania appellate courts not to hear this premature appeal. It does not.

Plainly put, there is no federal issue which this Court should (or even can) review in this case. Yet the defendants have attempted to fabricate one. They have done so by blatantly misrepresenting the nature of the proceedings, and of the trial court's interlocutory orders of August 20, 1998. Some of defendants' misrepresentations have already been corrected, *supra*. Plaintiffs will not attempt, here, to specifically address all of the other misrepresentations which permeate Defendants' Petition. For instant purposes, a simple but accurate summary of the case should prove more than sufficient.

This matter originally involved 14 civil actions, most of which were dismissed, unbeknownst to the plaintiffs, on 21 dispositive motions which plaintiffs' attorney, Thomas W. Smith, simply did not answer — as irrefutably established by

the pertinent docket entries.[6] When this was discovered, along with additional documented proof of Mr. Smith's abandonment of the cases and his fraud in concealing that abandonment, plaintiffs promptly moved for relief via the Omnibus Petition. The Petition detailed Mr. Smith's conduct and attached copious Exhibits showing his gross pattern of abandonment (*e.g.*, docket entries), fraudulent concealment (*e.g.*, correspondence, memoranda), and his mental state (*e.g.*, letter from Wolfram Rieger, M.D. to Friends Psychiatric Hospital, referring Mr. Smith for in-patient treatment of depression). Plaintiffs argued that, under Pennsylvania law, this pattern of abandonment, fraud, and Mr. Smith's mental illness each presented sufficient grounds for granting of the requested relief.

For 6 months the court received additional submissions — including at least 30 separate Responses to the Petition containing the arguments and information the defendants in

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[6] As the trial court accurately calculated, the docket entries showed that nearly all of the dispositive motions (17 of 21) which Mr. Smith failed to answer were filed in the space of two months, October and November of 1997. *See*, 6a-7a, n. 6.

each of the underlying cases thought most persuasive, followed by further replies and counter-replies which "continued until a few days" before the court issued its decision. *See*, 4a, n. 2. The court, as shown in its seventy page Memorandum Opinion ("Mem.Op.") dated August 20, 1998, considered the resulting mass of arguments and evidence scrupulously. For the reasons comprehensively detailed in that Opinion, the court granted the Omnibus Petition, opening the underlying judgments and putting the cases back on track, "to prevail — or fail — on their merits either at trial or prior to trial." *See*, 96a-97a.[7]

In seeking, now, a writ of certiorari, defendants offer "reasons" — as they did in their unsuccessful efforts to obtain premature review in the appellate courts of Pennsylvania — which essentially devolve to a single allegation: that the trial

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[7] By Opinion ("Op.II") and Orders dated September 18, 1998, the court denied defendants' motions for reconsideration but granted their request to seek a permissive, interlocutory appeal. As shown in the Counter-Statement of Jurisdiction above, both the Superior and Supreme Courts of Pennsylvania properly exercised their discretion not to prematurely review the matter. Furthermore, the Superior Court quashed the defendants' direct appeals, and the Supreme Court declined to review that legally mandated disposition.

court erred as a matter of law by granting the Omnibus Petition without allowing certain discovery requested by defendants. *See, e.g.*, Defendants' Petition at 4, 6-7. As will be shown below, this allegation is obviously meritless, indeed frivolous. However, the defendants seek to obscure this obvious truth behind a veil of false characterizations. Simply put, the case they portray is distorted beyond recognition.

For instance, reading Defendants' Petition, one would think that plaintiffs sought relief in the underlying cases based solely on the "alleg[ation] that [Mr. Smith] ... had **experienced a mental breakdown that caused him** to mishandle his clients' cases ..." *See*, Defendants' Petition at 3. (Emphases added).

That is, defendants focus exclusively on the cause of the gross pattern of extreme professional dereliction and fraud which plaintiffs contended warranted relief. They have virtually nothing to say about the pattern itself, which was incontestably established by the record and which the trial court properly found was dispositive. Furthermore, defendants repeatedly misrepresent that record, utterly ignoring pivotal and

undisputed documentary evidence (including, *inter alia*, the docket entries and defendants' own admissions), and instead erroneously describing a record consisting, essentially, of nothing more than "self-serving" allegations or evidence in plaintiffs' "exclusive control and possession". *See, id.* at i, 4, 6.

Most egregious, however, is defendants' blatant dishonesty in describing the trial court's decision. They characterize that decision as merely "accepting as true the self-serving facts alleged by the Plaintiffs", and as being "arbitrarily rendered" without affording defendants any opportunity to be heard. *See, id.* at 7, 13. *Also see, id.* at 4. The falsity of such characterizations was demonstrated beyond peradventure by the trial court itself, in two thoughtful and comprehensive Opinions discussed below.

## REASONS FOR DENYING THE WRIT

The Writ should be denied summarily because, as already demonstrated, there clearly is no jurisdiction. However, even assuming *arguendo* that this Court can assume jurisdiction, it should not do so, for the following reasons.

### A. Defendants Had No Right to Conduct the Proposed Discovery, Which was Not Designed, and Did Not Purport to be Designed, to Lead to the Resolution of a Genuinely Disputed Issue of Material Fact

#### 1. The Essential Bases of the August 20, 1998 Ruling, and of Defendants' Petition

After examining a voluminous record submitted by the parties, the trial court concluded that the record established a documented pattern of professional dereliction and fraud by Mr. Smith. *See*, Mem.Op. at 23a, 27a, 29a, 35a, 48a-51a, 59a-60a, 63a, 65a, 76a. This pattern, to which the Court repeatedly referred (*id.*), was "the basis for opening" the judgments at issue. *Id.* at 60a. The pattern of fraud, established by, *inter alia*, Mr. Smith's letters to clients (*id.* at 22a-24a, 76a) and memoranda to his superior (*id.* at 29a, n. 37), was "but one of the factors justifying opening of the judgments" (*id.* at 27a, n. 35); another was the pattern of professional dereliction (*id.* at 60a, 76a), including "Mr. Smith's pattern of progressive abandonment of his cases during a discrete period" (*id.* at 63a), established by, *inter alia*, the docket entries (*id.* at 76a) reflecting his failure to respond to some 21 dispositive motions,

nearly all of which were filed within the space of two months (id. at 6a-7a, n. 6), as well as averments regarding his abandonment of cases prior to the dispositive-motion stage which were either admitted by defendants, explicitly or implicitly (*see, e.g., id.* at 49a-51a, 61a-62a), or were in some instances established by defendants' own documents (*see, e.g., id.* at 59a-60a). Moreover, many of defendants' Responses to the Omnibus Petition provided yet further proofs of Mr. Smith's abandonment of cases, and averred additional conduct by Mr. Smith which amounted to fraud upon the court.[8]

The court also concluded that the record showed the origin, the underlying reason or cause for the documented pattern of professional dereliction and fraud — Mr. Smith's mental or emotional problems during the pertinent time period, diagnosed as depression. *See*, Mem.Op. at 27a, 76a.

It must be emphasized that Defendants' Petition is based on the denial of discovery requests which focused on

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[8] The court, in its subsequent Opinion of September 18, 1998 ("Op.II"), made clear that all of this evidence was weighed in its Opinion of August 20, 1998. *See*, Op.II. at 92a, n. 6.

this final conclusion. Defendants' Petition at 6-7. As the trial court aptly phrased it, "[defendants] seek discovery on the relative mental crisis of an attorney who failed to respond to 18 summary judgment motions and 3 motions in limine resulting in the dismissal of 13 cases during a relative short time period." Op. II. at 96a. *Also see, id.* at 92a-93a.

In other words, defendants contend only that they were not permitted to conduct discovery which, in opposition to Dr. Rieger's diagnosis and common sense, they suggest may show that the cause of the documented pattern of dereliction and fraud established by the record was not any impairment suffered by Mr. Smith, but something else — a "sane" decision, perhaps, to abandon his clients' cases and his career. However, they do not, and cannot credibly, contend that the requested discovery could disestablish the documented pattern of dereliction and fraud itself.

In denying defendants' Motion for Reconsideration, the court, in its Opinion of September 18, 1998 ("Op.II"), further demonstrated the wholly false character of the assertions which

the defendants have repeated here. In particular, the court expressly confronted, and utterly disproved, defendants' allegations regarding the record and the bases of the court's decision of August 20, 1998. *See*, Op.II at 90a-96a. Moreover, the court again demonstrated, beyond peradventure, that the discovery requested by defendants was not material, that its denial was an incontrovertibly proper exercise of trial court discretion, and that defendants' claim of a due process violation was, in any event, baseless. *See*, *id.* at 92a-96a.

The trial court's analysis, in both Opinions, conclusively shows the complete lack of merit in defendants' position. So, too, will the following brief review of certain essentials of Pennsylvania law governing discovery and materiality.

2. The Rules Governing Discovery

The Pennsylvania Rules of Civil Procedure governing petitions provide that "'[t]he respondent may take depositions, or such other discovery as the court allows.'" Pa.R.Civ.P. 206.7(d). (Emphases added). As with the similar provision allowing the petitioner to take such discovery "as the court

allows" (Pa.R.Civ.P. 206.7(c)), Rule 206.7(d) further presumes that an answer has been filed "raising disputed issues of material fact." Pa.R.Civ.P. 206.7(c). That is, the Rules provide that the parties may take such discovery as the court allows if an answer has been filed raising disputed issues of material fact. *See*, Explanatory Comment - 1995 to Pa.R.Civ.P. 206.

Thus, a trial court, in determining whether to allow a respondent to conduct discovery under Rule 206.7, must determine, among other things, whether the respondent has raised any disputed issues of material fact, as to which the proposed discovery may be relevant. These determinations will, necessarily, involve the exercise of discretion.

3. The Definition of "Material" Fact

It is well-settled under Pennsylvania law that "[a] fact is material if it directly affects the disposition of a case." *Allen v. Colautti*, 53 Pa. Cmwlth. 392, 417 A.2d 1303, 1307 (1980). (Emphases added). In an instructive passage on this point, the Commonwealth Court of Pennsylvania rejected a

contention that the denial of certain allegations posed a bar to the granting of judgment on the pleadings, stating:

> Here we need only observe that it is only disputes as to material issues of fact which bar summary judgments. The facts disputed by the Petitioner simply are not material to any of the critical issues raised by Petitioner in his petition for relief. To put it another way, if these disputed issues were resolved in Petitioner's favor, he would be denied relief, nevertheless.

*Pierce v. Com., Pennsylvania Bd. of Probation and Parole*, 46 Pa. Cmwlth. 507, 406 A.2d 1186, 1188-89 (1979). (Emphasis on "material" in original; other emphases supplied).

**4. Application - the Requested Discovery did Not Involve a Disputed Issue of Material Fact, and the Discretionary Ruling Not to Allow that Discovery was Clearly Proper**

While not essential to the trial court's ruling, there really could be no genuine dispute that the underlying reason for the documented pattern of extreme dereliction and fraud in this matter lay in an impairment suffered by Mr. Smith. This was not only shown by the psychiatric evaluation of record, but by common sense. It simply is obvious that a lawyer with Mr.

Smith's decades of experience would have known that the failure to answer dispositive motions which resulted in the dismissal of nearly a dozen cases, most on motions filed within the space of two months, would, when discovered (along with his fraud in concealing those dismissals), lead to termination, probable disbarment, and, as a practical matter, the destruction of his career. It is self-evident that something in his mind must have been gravely amiss, to forfeit his livelihood in this way.

Nevertheless, even were it assumed *arguendo* that the defendants could show otherwise — that, through the proposed discovery, they could show a different cause for the pattern of dereliction and fraud established by the record — it would be a futile showing. That is because this hypothesized "proof" simply would not concern a material issue of fact.

An understanding that Mr. Smith was suffering such an impairment was certainly an important part of the full narrative — what the trial court referred to as the "global view" of the cases. *See*, Mem.Op. at 65a. And in fact, although the court only mentioned this factor twice in its Memorandum Opinion,

it properly cited it as one of the factors in its decision. *Id.* at 76a. *Also see, id.* at 27a; Op.II. at 96a. Yet there is no question that the decision would, and should, have been the same absent that factor. As shown above, the court repeatedly cited, as the basis for its decision, the documented pattern of dereliction and fraud — a pattern which existed regardless of the precise reason for it; and defendants do not and cannot contend that the proposed discovery could show otherwise.

This was made clear in the Memorandum Opinion, where "[i]n denying defendants' Motion for a Scheduling Order for discovery, this court concluded that the extensive discovery requested was not material to the central issues presented in the Omnibus Petition." *See*, Op.II. at 92a (Emphases added). However, in denying the Motion for Reconsideration, the court demonstrated this fact again, pointedly. Thus, discussing Pa. R.Civ.P. 206.7, the court noted that it provides for discovery:

> "*[A]s the court allows*" where an answer is filed raising disputed issues of *material* fact." For this court, the extreme pattern of professional dereliction, fraud, combined with diagnosed depression (all occurring during a relatively

> short time period) were the material facts. The discovery defendants seek concerning Mr. Smith's mental breakdown might shed light on an element within this pervasive pattern — but it would not be relevant to minimizing its impact on the fate of plaintiffs' cases.

Op.II. at 93a-94a. (Emphases in original). *Also see, id.* at 93a.

Thus, the proposed discovery did not involve a material fact because, even assuming it could prove all that defendants contend, that proof would not "directly affect the disposition of the case." *Allen, supra*, 417 A.2d at 1307. "To put it another way, if these disputed issues were resolved in [defendants'] favor, [they] would be denied relief, nevertheless." *Pierce, supra*, 406 A.2d at 1189. Hence, the discretionary decision not to allow defendants to conduct the time-consuming, intrusive, and immaterial discovery they proposed was eminently proper.

B. Defendants' Due Process Claim is Frivolous

Defendants' due process claim is based solely on this denial of their discovery requests. It is the same claim which they made in seeking, unsuccessfully, to obtain premature review in the appellate courts of Pennsylvania. As such, it must

be summarily rejected. Yet defendants contend that the trial court's eminently proper exercise of discretion was not only error, but deprived them of due process. That is absurd.

Denial of the proposed discovery was plainly warranted, for the reasons stated by the trial court itself. See, Op.II. at 93a-96a. The applicable law vests that court with authority to allow discovery, as appropriate, when certain predicates are met; they clearly were not met here. Thus, there is no question that the court properly exercised its discretion. Defendants' due process claim is, therefore, frivolous on its face.[9]

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[9] It should be noted that the cases cited by defendants, for the proposition that a final judgment constitutes a protected property right (*see*, Defendants' Petition at 9), are plainly inapposite, and indeed, they undermine defendants' argument here. For example, the first-cited case, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995), did not involve this issue at all. It dealt with a separation of powers question: whether a "legislative instruction to reopen [judgments] impinges upon the independent constitutional authority of the courts." *Id.*, 115 S.Ct. at 1460. This Court rejected, as irrelevant to that question, petitioners' argument based on Federal Rule of Civil Procedure 60(b). *Id.* In so doing, it observed that Rule 60(b) "merely reflects and confirms the courts' own inherent and discretionary power ... to set aside a judgment whose enforcement would work inequity. ... Thus, Rule 60(b), and the tradition that it embodies, would be relevant refutation of a claim that reopening a final judgment is always a denial of property without due process ..." *Id.* (Emphasis added). Defendants' reliance on *Plaut* is, therefore, not only confusing, it is self-defeating.

This is especially so given the current status of these proceedings. As further shown below, defendants clearly have not, in point of fact, been deprived of any cognizable property interest — much less have they been so deprived in a manner violative of their rights. Put another way: these defendants cannot even credibly contend that any legal prejudice has resulted, or will result, from the phantom denial of due process which they falsely allege occurred.

### C. Defendants Have Not Shown, and Cannot Show, That They Will Suffer Any Prejudice Whatsoever by Having to Wait, as the Law Requires, Until Their Claims Can be Properly Raised on Appeal

In the trial court, defendants made either no claims of prejudice, asserted vague, conclusory claims, or merely urged that prejudice be presumed from the passage of time. Mem. Op., at 38a-41a. These claims were patently insufficient under Pennsylvania law, and the court properly disposed of them. *Id.*

Notably, the defendants, in their Petition to this Court, offer no argument on the issue of prejudice at all. They have not attempted to establish prejudice because they cannot do so.

Their silence speaks for itself. However, in concluding this Brief, plaintiffs must repeat an observation that goes to the rather simple essence of this issue.

Pursuant to the trial court's Orders, all of the underlying cases were set down for new case-management conferences. There are, now, various possible outcomes. For example, some of the cases may settle; others may go to trial and result in verdicts for plaintiffs — while yet others, theoretically, could end with judgments for the defense. There are, in any event, two certainties. One is that, if the proceedings are not further delayed by premature appeals, each of the cases will now be disposed of on the merits. The other is that defendants cannot possibly be prejudiced by this process. If, as some defendants have suggested, the cases lack merit, this will be shown soon enough, by dispositions in their favor. If, instead, any of the cases proceed to verdicts against the defendants, they may, then, appeal the very rulings they have complained of herein. As the trial court aptly observed:

> The practical effect of the August 20, 1998 orders granting Plaintiffs' Omnibus Petition, it should be remembered, is not to deny any party discovery on the merits of the claims asserted by plaintiffs. Although defendants suggest that it was error to grant this Petition because discovery at this juncture will reveal that at least some of plaintiffs' cases were without merit, ... **the best method for making this determination is to place these cases back on track where they will prevail — or fail — on their merits either at trial or prior to trial.**

Op.II. at 96a-97a. (Footnote omitted) (emphases added).

**D. Defendants' Petition is Frivolous on its Face, and Rule 42 Sanctions Should be Imposed**

The Rules of this Court provide, in pertinent part, that "[w]hen a petition for a writ of certiorari ... is frivolous, the Court may award the respondent ... just damages, and single or double costs under Rule 43. ..." *See*, Rules of the Supreme Court of the United States, Rule 42(2). Defendants' Petition, here, is the very definition of a frivolous filing.

As shown at the outset of this Brief, there is no good faith basis for these defendants even to claim that this Court can exercise jurisdiction, much less that it should do so. Yet, they attempt to evade this patent truth simply by asserting the

most patent falsehoods — brazenly asserting, for example, that the supposed "constitutional question" here "is not subject to further review in the State court proceedings" (*see*, Defendants' Petition at 2), when they know, as they must, that this is utterly and demonstrably false. As also shown above, even were there jurisdiction (and there is not), the "merits" of Defendants' Petition rest, similarly, on a foundation so obviously flawed as to be completely without integrity — that is, upon a fabricated claim of a phantom deprivation of rights from which no cognizable harm did or could result, as a matter of law.

In sum, defendants have chosen to burden this Court and the other parties to this litigation with a filing they know to be frivolous. They should, now, be held accountable, at least to the extent contemplated under the Rules, to deter such flagrantly frivolous filings in the future. Plaintiffs therefore request an award of just damages, in the form of attorneys fees and costs, in addition to any other relief or sanction this Court may deem appropriate.

## CONCLUSION

For all of the foregoing reasons, it is respectfully requested that certiorari be denied, and that sanctions be imposed against defendants, and just damages awarded to plaintiffs, pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States.

Respectfully submitted,

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